


September 9, 2010

ARRA's BUY AMERICAN PROVISION

TO: Senior Management Team for Recovery, ARRA Contractors, Local Governments

FROM: Dempsey Benton, Director 
Office of Economic Recovery and Investment

SUBJECT: Compliance with ARRA's Buy American Provision, Its Effects and Waivers

ARRA's Buy American Provision

Section 1605 of the American Recovery and Reinvestment Act (ARRA) requires that infrastructure projects that involve the construction, alteration, maintenance or repair of public buildings or public works must be accomplished using iron, steel and manufactured goods produced in the U.S. in compliance with Buy American. The Buy American provision is applied in a manner consistent with U.S. obligations under international agreements. Exceptions can be made only by the heads of federal departments or agencies when use of domestic products is:

- i. Inconsistent with the public interest;
- ii. Compromised because there are insufficient or reasonably unavailable quantities of domestic products or their quality is unsatisfactory; or
- iii. Such use is likely to increase the cost of the overall project by 25% or more.

All waiver requests must be submitted directly to the granting federal agency; most agencies accept these requests by email. If state agencies or contractors have questions about waiving this requirement, they should contact the federal granting agency since waiver decisions are made on a case-by-case basis by federal agencies. Buy American does not apply to ARRA Part B Bond-financed projects.

Definitions (2 CFR, Section 176.140, 176.160):

Public buildings or public works - A building or work of a government entity.

Steel - An alloy that includes 50% iron and between .02 and 2 percent carbon.

Manufactured goods - A good brought to the construction site for incorporation into the building or work that has been (a) processed into a specific form or (b) combined with other raw material to create a qualitatively different material.

Produced in the U.S. - A good that is either wholly produced in the U.S., or, if it contains materials from another country, has been substantially transformed in the U.S. into a new and different manufactured good.

Application

FAR: A Federal Acquisition Regulation was issued by the Civilian Agency and Defense Acquisition Councils **applying ARRA's Buy America provision to ARRA construction contracts between \$2,001** (> the \$2,000 micro-purchase threshold) **and \$7.433 million** (the World Trade Organization Agreement on Government Procurement's threshold).

74 Federal Register 14622 (Mar. 31, 2009)

Iron and steel: In general, all iron and steel manufacturing processes must take place in the U.S., except metallurgical processes involving refinement of steel additives. However, these requirements do not extend to iron or steel used as components or subcomponents of manufactured goods used in the project.

Components of manufactured goods: No requirement is extended with regard to the origin of components or subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the U.S.

(2 CFR Sections 176.70-80)

Certification: Where Buy American applies, prime recipients should maintain a certification from contractors that they complied with Buy American during the course of the project.

ARRA Buy America Waivers granted:

Note this waiver list is not exhaustive. It encompasses nationwide, categorical waivers that apply to everyone, everywhere, but does not include all of the specific waivers granted to particular projects across the country which apply only to those projects. To date, N.C. has received one project-specific Buy American waiver issued by the EPA for a project in Johnston Co. Some project-specific waivers granted to entities outside of N.C. are included below and are to be used only as a reference for how these requests were treated by various federal agencies and to provide instruction as to how similar waiver requests might be formulated.

- **Canada**
 - Canadian products are now exempt from Buy American but only for ARRA-funded projects. Agreement reached February 16, 2010.
- **Department of Energy (DOE)**
 - Numerous categorical waivers were issued for projects through the Office of Energy Efficiency and Renewable Energy (EERE) based on non-availability. See chart for specifics:
http://www1.eere.energy.gov/recovery/pdfs/waiver_chart.pdf.
 - A 5% nationwide *de minimis* waiver was granted such that EERE ARRA fund recipients may source up to 5% of "incidental components."
 - Issued May 24, 2010
 - Nationwide categorical waiver for all EERE ARRA-funded projects using LED traffic lights, arrows, and crosswalk signals (excluding the metal or plastic fixtures); fluorescent electronic lighting ballasts (with the exception of electronic dimming ballasts for fluorescent lamps that are capable of operating the lamps below 50% of their rated light output); and screw-base and pin-base compact fluorescent lamps (CFLs) (with the exception of plug-in CFLs longer than 10 in.).
 - Federal Register/Vol. 75, No. 43/Friday March 5, 2010/10246

- EERE granted a 6 month waiver on Aug. 6, 2010 for incidental and/or ancillary solar Photovoltaic (PV) equipment, when this equipment is utilized in solar installations containing domestically manufactured PV cells or modules (panels).
- EERE granted a limited, national waiver for LED lighting and HVAC units where the recipient took “substantial steps” to commit funds for the purchase of lighting or HVAC units **between Feb. 17, 2009-March 31, 2010**. This waiver expired March 31, 2010 and any subsequent purchase of LED lighting (aside from the nationwide categorical waiver granted above which is still in existence) and HVAC units need to comply with ARRA’s Buy American provision.
 - For additional information on what constitutes “substantial steps” see: http://www1.eere.energy.gov/recovery/pdfs/eere_nationwide_public_interest_waiver.pdf
- **Department of Homeland Security**
 - Limited public interest waiver granted for TSA Electronic Baggage Screening Program projects constructing a Checked Baggage Inspection System (CBIS) where 95% of the project will comply with Buy American. CBIS is a highly sophisticated electromechanical system for screening baggage and consists of many mechanical and electrical items which cannot all be found domestically.
 - Federal Register/Vol. 74, No. 196/Tuesday, Oct. 13, 2009/52499
- **Environmental Protection Agency (EPA)**
 - Cities and counties nationwide receiving State Revolving Fund money under ARRA may source up to 5% of “incidental components.” (*de minimis* waiver)
 - Federal Register/Vol.74, No.152/Monday, Aug. 10, 2009/39959
 - All EPA eligible, shovel ready projects for which debt was incurred on or after October 1, 2008 and before February 17, 2009 (the date of ARRA’s enactment)
 - Federal Register/Vol. 74, No. 65/Tuesday, April 7, 2009/15722
 - Waiver for Johnston Co., NC for the purchase of resin beads from the sole manufacturer, an Australian company, to complete a drinking water treatment project
 - Federal Register/Vol. 74, No. 226/Wednesday, Nov. 25, 2009/61687
 - Regional Project waiver granted to Albany County Sewer District (NY) for a foreign manufactured turbine generator to recover waste heat from the sludge incineration operation at the wastewater treatment plant and to produce electrical power for onsite consumption
 - Federal Register/Vol. 75, No. 22/Wednesday, Feb. 3, 2010/5585
- **Department of Health and Human Services**
 - Indian Health Service (IHS)
 - A 5% nationwide *de minimis* waiver was granted such that IHS ARRA fund recipients may source up to 5% of “incidental components” for sanitation facilities construction projects.
 - Federal Register/Vol. 75, No. 114/Tuesday, June 15, 2010/33818

- **National Science Foundation**
 - Waiver for a bow thruster propulsion device for the bow of the vessel in the Alaska Region Research Project because ice certified bow thrusters are not produced in the U.S. in sufficient and reasonable quantities.
 - Federal Register/Vol. 75, No. 39/Monday, March 1, 2010/9256
- **National Telecommunications and Information Administration (NTIA)**
 - Waiver for equipment on BTOP-funded projects (This waiver does not extend to fiber optic cables, coaxial cables, cell towers, and other facilities that are produced in the US in sufficient quantities to be reasonably available as end products) includes:
 - Broadband Switching Equipment – Equipment necessary to establish a broadband communications path between two points.
 - Broadband Routing Equipment – Equipment that routes data packets throughout a broadband network.
 - Broadband Transport Equipment – Equipment for providing interconnection within the broadband provider’s network.
 - Broadband Access Equipment – Equipment facilitating the last mile connection to a broadband subscriber.
 - Broadband Customer Premises Equipment and End-User Devices – End-user equipment that connects to a broadband network.
 - Billing/Operations Systems – Equipment that is used to manage and operate a broadband network or offer a broadband service.
 - Federal Register/Vol. 74, No. 125/Wednesday, July 1, 2009/31410
- **U.S. Department of Agriculture (USDA)**
 - Waiver for Custer County, South Dakota for the purchase of foreign manufactured HVAC equipment for a courthouse renovation project because the necessary manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities and of a satisfactory quality.
 - This action permits the purchase of a Daikin VRV III HVAC unit and Tempeff Dual Core Technology unit of Japan and Canada respectively. These units address the operational requirement to heat and cool simultaneously, perform very efficiently, and are compatible and adaptable to the space restrictions created by the existing facility.
 - Federal Register/Vol.75, No. 155/August 12, 2010/48930
 - A 5% nationwide *de minimis* waiver was granted by the Rural Housing Service for eligible publicly owned essential community facilities projects using assistance provided under ARRA such that recipients may source up to 5% of “incidental components.”
 - Federal Register/Vol. 75, No. 117/June 18, 2010/14812